

1985

State of Utah, by and through Utah State
Department of Social Services v. Joey Gutierrez :
Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT, STATE OF UTAH

STATE OF UTAH, BY AND THROUGH)	
UTAH STATE DEPARTMENT OF SOCIAL)	RESPONDENT'S BRIEF
SERVICES,)	
)	
Plaintiff-Respondent)	Case No. 20396
)	
Vs.)	
)	
JOEY GUTIERREZ,)	
)	
Defendant-Appellant.)	

Appeal from the Judgment Rendered in the Third Judicial District Court, Salt Lake County, Honorable James S. Sawaya, Presiding.

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STATEMENT OF FACTS

JoAnn Candelaria is the unwed mother of two children, Joseph Candelaria, born 22, January, 1980, and Jessica Candelaria, born 30 December, 1980. Ms. Candelaria applied for public assistance in February, 1980. In her application for assistance, Ms. Candelaria listed Joseph Gutierrez as the possible father of Joseph Candelaria. On 17 December, 1980, Ms. Candelaria applied for additional benefits due to the soon to occur birth of Jessica Candelaria. In the December, 1980, application, Ms. Candelaria listed Joseph Gutierrez as the possible father of both children. After locating Mr. Gutierrez, the Office of Recovery Services attempted to arrange serological tests to be performed, but Mr. Gutierrez failed to appear for his appointments. After relocating Mr. Gutierrez in March, 1983, Mr. Gutierrez's case was referred to the Salt Lake County Attorney's Office for filing of a paternity action. That suit was filed, accompanied by the Affidavit of Ms. Candelaria, which stated that she believed Joseph Gutierrez to be the father of her two children. Mr. Gutierrez failed to appear for serological tests informally scheduled by the Salt Lake County Attorney's Office and appeared for such tests only after being so ordered by the District Court. The test results excluded Mr. Gutierrez as the biological father of the child, Joseph, but showed Mr. Gutierrez as the highly probable father of Jessica (Tr. Exhibit 14).

Three witnesses testified at the trial held to resolve the paternity of Jessica; Ms. Candelaria, Joseph Gutierrez and Dr. Charles DeWitt. Ms. Candelaria testified that she met Joseph Gutierrez in the summer of 1979 (Tr. pg. 95) and began having sexual intercourse with him after her last menses in May, 1979 (Tr. 103). Ms. Candelaria testified that based on her relationship with Mr. Gutierrez she believed he was the father of her first child, Joseph Jr. (Tr. pg. 96, 97). She further testified that soon after the birth of Joseph Jr., she and Mr. Gutierrez had sexual intercourse which resulted in the conception of her second child, Jessica (Tr. pg. 98). Joseph Gutierrez gave concurring testimony relating to their relationship, but denied in his trial testimony of having sexual intercourse after the birth of Joseph Jr., even though his responses to Interrogatories and Request for Admissions indicated he could not remember if he had intercourse during that time period (Tr. 123-125).

Dr. Charles DeWitt, a pathologist at the University of Utah Medical Center, testified that serological tests did not exclude Joseph Gutierrez as the possible biological father of the child Jessica. The serological tests indicated that Mr. Gutierrez had corresponding genetic makeup to that of Jessica's biological father, that the genetic makeup occurred in only five individuals per ten thousand; thus, Mr. Gutierrez's probability of paternity was 95% (Tr. 78, 79).

SUMMARY OF ARGUMENT

1. The District Court did not err in refusing to admit

Defendant's reputation evidence relating to Ms. Candelaria.

2. The trier of fact, receiving the witnesses' testimony and giving the evidence what weight it considered appropriate, determined that Mr. Gutierrez was the father of Jessica. That determination is not to be disturbed by this Court, on appeal, as it is not clearly against the weight of the evidence or without substantial support.

ARGUMENTS

I. THE DISTRICT COURT PROPERLY REFUSED TO ADMIT REPUTATION EVIDENCE.

In examining Mr. Gutierrez, defense counsel asked Mr. Gutierrez if he knew of Ms. Candelaria's reputation. Defendant's use of ellipses in his brief is improper as the omitted portions are necessary for an understanding of the exchange. The full text is located at pages 119 and 120 of the record and, in pertinent part, reads:

"Q. Do you know of Ms. Candelaria's reputation?
Mr. Mooy: Objection Your Honor. Reputation is not an issue. Objection specifically, Rule 404, Rules of Evidence, character evidence is not admissible...

The Court: Let's see what it says... Well, of course, 404 is generally applicable to evidence in criminal cases, which this is not. As I read it -- "evidence of a person's character or trait is not admissible for the purpose of proving that he acted in conformity thereof on a particular occasion." I suppose that your intention is to show that her character -- that she has a rather loose character when it comes to men. I am not sure that you can show that as evidence of the fact that she might have had relations with one or more other people during the period of gestation.

I think the objection is well taken; I will sustain it."

Defendant concedes that evidence relating to Ms. Candelaria's reputation for promiscuity is inadmissible (Defendant's brief, 7). Defendant argues that the District Court erred in refusing to admit evidence relating to honesty. However, Defendant failed to comply with the requirements of Rule 608, Utah Rules of Evidence. The applicable portion of Rule 608 is as follows:

"(a) Opinion and reputation evidence of character -- The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness,..." (emphasis added).

The trial court informed Defendant's counsel that the objection was sustained as the expected testimony would have dealt with Ms. Candelaria's reputation for promiscuity. Defendant's counsel made no indication or effort to dissuade the trial court that the testimony sought would expurgate testimony relating to reputation for honesty from testimony relating to promiscuity. As the specific basis for the objection was given by the State's counsel (Rule of Evidence 404) and the trial court sustained the objection upon that basis, Defendant's counsel should have informed the court that the evidence would have complied with the requirements of Rule of Evidence 608 by being limited to Ms. Candelaria's reputation for honesty only. Defendant's counsel could, as well, have requested the trial court, pursuant to Rule of Evidence 105, to admit the evidence for the purpose of attacking Ms. Candelaria's credibility (assuming the testimony would have dealt with honesty), even though it was not admissible as evidence to show

she may have had intercourse with other individuals near the time of conception.

The error, if any occurred, lies in Defendant's failure to purge the anticipated testimony from the taint of inadmissible subject matter such that the limitations of Rule of Evidence 608 would have been met. The trial court's ruling on the objection did not preclude Defendant from introducing evidence which dealt solely with Ms. Candelaria's credibility. Defendant's failure to pursue such an avenue was an abandonment of his course to introduce reputation evidence.

II. SUFFICIENT EVIDENCE WAS RECEIVED BY THE TRIAL COURT FOR AFFIRMANCE OF ITS DETERMINATION.

"On appeal the evidence is viewed in the light most favorable to sustain the lower court, and the findings will not be disturbed unless they are clearly against the weight of the evidence or it manifestly appears that the court misapplied the law to the established facts." Hardy v. Hendrickson, 27 Utah 2d 281,284, 495 P.2d 28,29 (1972).

"The court indulges the findings and judgment of the trial court with a presumption of validity and correctness and reviews the record in the light favorable to them, and will not disturb them if they find substantial support in the evidence. Also, the appellant must bear the burden of demonstrating error." Litho Sales, Inc. v. Cutrube, 636 P.2d 487, 488 (Utah 1981).

Defendant, in his brief, argues that a review of the trial transcript would not produce sufficient evidence to support the trial court's determination of paternity. Yet each of the instances cited by the Defendant is countered by the trial transcript. Ms. Candelaria at age 16, met Mr. Gutierrez after her last menses in May

of 1979 (Tr.103), she honestly believed Mr. Gutierrez to be the father of her first child (Tr. 110-112), as they had had intercourse during the time she believed she conceived her first child. Due to their relationship, there was no need to announce that Mr. Gutierrez was the father of the expected child as it was generally assumed to be his child (Tr. 110,111), even Mr. Gutierrez assumed it was his child (Tr.120). It was only after serological testing that their beliefs were shown to be in error. The statistical evidence of the serological testing relating to Jessica showed that Ms. Candelaria's chance of picking Mr. Gutierrez as the father of Jessica, if he were not her father, was only one in two thousand (Tr. 78,79). Dr. DeWitt testified that the statistical evidence is to be used by the trier of the fact in its determinations if one assumes or by hypothetical considers that other individuals had intercourse during the time of conception and the trier of fact must determine if the alleged father or one of the other individuals is the biological father (Tr. 86-88). Respondent could continue to rehash the testimony of the witnesses with Appellant on appeal, but such is improper. Appellant's contention in his Argument II is similar to that made in Bennion v. Hansen, 70 UAR 37 (1985). There, this Court stated:

"(Appellant's) brief ignores the trial court's findings and invites this Court to reweigh all the evidence on the issue and independently find the facts. That is not this Court's role, and we firmly decline the (Appellant's) invitation."
Id. at 38.

Appellant, here, asks this Court to reweigh the testimony of the

witnesses on the cold, second hand basis of a transcript and substitute this Court's findings for that of the original trier of fact who received such testimony first hand, viewing the witnesses' candor, demeanor and deportment. As stated by this Court in Bennion v. Hansen, supra., this Court should decline the invitation. Appellant has failed to meet his burden of demonstrating error in the trial court's findings by showing that it is without substantial support and clearly against the evidence. Unlike the trial court's finding in Isham v. Mullally, 15 Wis. 2d 249, 112 NW 2d 701 (1961), (which found a gestation period far in excess of reasonably expected human gestation to support its determination) nothing in the trial court's findings here is against the evidence and without support. To paraphrase this Court in Bennion v. Hansen, supra. at 38, considering the evidence under the appropriate standards, this Court should conclude that the trial court's findings have adequate evidentiary support and should not be disturbed.

CONCLUSION

The trial court's findings and determination should be affirmed.

RESPECTFULLY SUBMITTED this 3 day of ^{June} ~~May~~, 1985.

TED CANNON,

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I hereby certify that I mailed four copies of Respondent's Brief to J. William Ebert, Attorney for Defendant-Appellant, at 770 East South Temple, Suite A, Salt Lake City, Utah 84102-1218 on this _____ day of May, 1985.
